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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

UNITED STATES OF AMERICA,	)	No.: CR 08-00156 JW
	)	
Plaintiff,	)	UNITED STATES' RESPONSE AND
	)	OPPOSITION TO DEFENSE'S MOTIONS
v.	)	<i>IN LIMINE</i> AND PROPOSED JURY
	)	INSTRUCTIONS
STEVEN RODRIGUEZ,	)	
	)	Hearing: July 24, 2008
Defendant.	)	Time: 9:00 AM
	)	Court: Hon. J. Ware
	)	

The United States of America, through its counsel Jeffrey Schenk and Richard Cheng, Assistant United States Attorneys, hereby submits the following motions in limine in the above-captioned case.

**I. INTRODUCTION**

The defendant is charged by indictment with two counts, 18 U.S.C. § 922(g)(1), Felon in Possession of Firearm and Ammunition and 18 U.S.C. § 922(g)(3) Controlled Substance User in Possession of a Firearm and Ammunition.

## II. RESPONSE AND OPPOSITION

### A. Witnesses

Mr. Rodriguez states that he "...has subpoenaed a number of witnesses who have also been served by the government... ." The government requests that the defense not rely on witness compliance with any government subpoenas and that all witnesses necessary for the defendant to present a defense receive subpoenas from the defense.

### B. Motions in Limine

#### 1. Audio Recordings

The defense seeks to introduce the recording of Mr. Rodriguez' post-arrest statement. First, the defense argues its admission is for the purpose of establishing Mr. Rodriguez' sobriety rather than for the truth of the matters asserted. We disagree. Mr. Rodriguez intends to introduce a defense of justification. The recording contains statements useful for this purpose and a limiting instruction to the jury will not cure the defect created by the jury hearing the content of the recording. Additionally, it is our expectation that Mr. Rodriguez will stipulate to drug use on the day of arrest. Therefore, this matter will no longer be an issue for the jury to decide; thus, making the admission of Mr. Rodriguez' statement for a non-truth purpose irrelevant evidence.

On the other hand, Mr. Rodriguez' admissions, contained within the recorded statement, remain relevant, non-hearsay evidence.

#### 2. Mr. Rodriguez' Prior Convictions

The government and defense believe that the government should be allowed to impeach Mr. Rodriguez, as a witness, with his prior convictions. We disagree about the admissibility of the specific nature of the prior convictions, i.e. spousal abuse. The government believes the jury would benefit from hearing the specific nature of Mr. Rodriguez' prior convictions, because Mr. Rodriguez must prove, if he succeeds in receiving a justification/self-defense jury instruction, that he did not reckless place himself into the situation requiring him to engage in criminal conduct. *See* Defendant's Motions in Limine page 8 line 15 and *United States v. Johnson*, 459

1 F.3d 990, 997-98 (9<sup>th</sup> Cir. 2006). By cross-examining Mr. Rodriguez regarding his prior  
 2 convictions for spousal abuse, the government would be asking the jury to determine whether  
 3 Mr. Rodriguez recklessly caused or placed himself into this situation. Through this evidence, a  
 4 reasonable jury could conclude that Mr. Rodriguez' version of events, that he was defending  
 5 himself against an attack by Ms. Watkins, lacks credibility.

### 6 3. Gang Affiliation

7 The government does not intend to introduce evidence of Mr. Rodriguez' affiliations  
 8 with criminal gangs. Although, the government believes this prejudicial evidence is not  
 9 "unfairly" prejudicial. This evidence is not inadmissible under Rule 403 of the Federal Rules of  
 10 Evidence.

## 11 C. Jury Instructions

### 12 1. Self-Defense

13 The defense attempts to create distinct jury instructions for "self-defense" and  
 14 "necessity/justification." This approach is contrary to 9<sup>th</sup> Circuit precedent. The Court in  
 15 *Beasley* found:

16 The analysis of *Dominguez-Mestas* is applicable here. As  
 17 concluded above, the affirmative defense of justification does not  
 18 involve the refutation of any of the elements of §922(g)(1), but  
 19 requires proof of additional facts and circumstances distinct from  
 20 the evidence relating to the underlying offense. It is immaterial  
 21 whether an affirmative defense to § 922(g)(1) is termed  
 22 "justification," "necessity," "duress," or "self-defense;" however,  
 23 the broader term of "justification" will usually encompass all of  
 24 these defenses to § 922(g)(1). See *Gomez*, 92 F.3d at 774, n. 5,  
 25 n.9; *United States v. Lemon*, 824 F.2d 763, 765 (9<sup>th</sup> Cir. 1987)  
 26 (defendant charged under § 922(g)(1) asserting self-defense and  
 27 defense of a third person must present evidence demonstrating the  
 28 four elements of the justification defense). Accordingly, we hold  
 that the district court did not err in placing the burden of proving  
 the defense of justification by a preponderance of the evidence on  
 the defendant.

24 *United States v. Beasley*, 346 F.3d 930, 934-935 (9<sup>th</sup> Cir. 2003). The elements a defendant must  
 25 prove and the jury instruction are identical for both self-defense and justification/necessity.

### 26 2. Necessity

1 The government maintains that the defendant bears the burden of proving that his  
 2 possession of the firearm was justified. *See United States v. Beasley*, 346 F.3d 930 (9<sup>th</sup> Cir.  
 3 2003) and *United States v. Johnson*, 459 F.3d 990 (9<sup>th</sup> Cir. 2006). The standard for determining  
 4 whether the defendant's actions were necessary is objective. *United States v. Perdomo-Espana*,  
 5 522 F.3d 983, 988 (9<sup>th</sup> Cir. 2008). If the Court determines the defendant has pled sufficient facts  
 6 to warrant a self-defense jury instruction, the governments requests that the Court use 9<sup>th</sup> Circuit  
 7 Model Jury Instruction 8.60. 9TH CIR. CRIM. JURY INSTR. 8.60 (2003) This is the same jury  
 8 instruction quoted in *United States v. Beasley*, 346 F.3d 930 (9<sup>th</sup> Cir. 2003).

### 9 3. Reasonable Doubt

10 The government objects to the supplemental "reasonable doubt" jury instruction  
 11 requested by the defense.

### 12 4. Jury Instructions

13 The government requests that the Court give the following non-exhaustive list of  
 14 standard instructions from the Ninth Circuit Manual of Model Criminal Jury Instructions, 2003  
 15 Edition:

#### 16 Preliminary Instructions:

17 1.1 – Duty of Jury

18 1.3 – What is Evidence

19 1.4 – What is Not Evidence

20 1.5 – Evidence For Limited Purpose

21 1.6 – Direct and Circumstantial Evidence

22 1.7 – Ruling on Objections

23 1.8 – Credibility of Witnesses

24 1.8 – Conduct of the Jury

25 1.10 – No Transcript Available to Jury

26 1.11 – Taking Notes

27 1.12 – Outline of Trial

Instructions in the Course of Trial:

2.1 – Cautionary Instruction - First Recess

2.2 – Bench Conferences and Recesses

2.4 – Stipulations of Fact

Instructions at End of Case:

3.1 – Duties of Jury to Find Facts and Follow Law

3.2 – Charge Against Defendant Not Evidence - Presumption of Innocence - Burden of Proof

3.3 – Defendant’s Decision Not to Testify [or 3.4 – Defendant’s Decision to Testify]

3.5 – Reasonable Doubt – Defined

3.6 – What is Evidence

3.7 – What is Not Evidence

3.8 – Direct and Circumstantial Evidence

3.9 – Credibility of Witnesses

3.10 – Evidence of Other Acts of Defendant or Acts and Statements of Others

3.18 – Possession–Defined

Consideration of Particular Evidence:

4.1 – Statements by Defendant

4.14 – Eyewitness Identification

4.17 – Opinion Evidence, Expert Witness

Responsibility:

5.6 – Knowingly – Defined

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Jury Deliberations:

7.1 – Duty to Deliberate

7.2 – Consideration of Evidence

7.3 – Use of Notes

7.4 – Jury Consideration of Punishment

7.5 – Verdict Form

7.6 – Communication With Court

DATED: July 23, 2008

Respectfully submitted,

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\_\_\_\_\_/s/  
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